

FEDERAL CIRCUIT COURT OF AUSTRALIA

LATA & ANOR v MINISTER FOR IMMIGRATION & ANOR [2018] FCCA 2995

Catchwords:

MIGRATION – Review of decision by Administrative Appeals Tribunal – whether Administrative Appeals Tribunal’s decision affected by jurisdictional error – whether Administrative Appeals Tribunal failed to make a finding in respect of Public Interest Criterion 4020 – whether Administrative Appeals Tribunal made findings that were open to it – whether Administrative Appeals Tribunal failed to take into account relevant facts and information – whether Administrative Appeals Tribunal took into account irrelevant matters – whether Administrative Appeals Tribunal failed to accord applicants procedural fairness – whether Administrative Appeals Tribunal failed to comply with section 359AA of the *Migration Act 1958* (Cth) – no jurisdictional error – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.31, 36, 57, 65, 97, 338, 357A, 359A, 359AA, 360, 374, 376, 474, 476

Migration Regulations 1994 (Cth), reg.2.0, sch.1, sch.2 cls.820.226, 801.226, sch.4 cls.4020, 4021

Cases cited:

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476

Trivedi v Minister for Immigration and Border Protection [2014] FCAFC 42

SZBYR v Minister for Immigration and Citizenship (2007) 235 ALR 609

First Applicant:	CHANDRA MOHINI LATA
Second Applicant:	RAHUL RAJEEN CHAND
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 217 of 2017
Judgment of:	Judge Emmett

Hearing date:	22 October 2018
Date of Last Submission:	22 October 2018
Delivered at:	Sydney
Delivered on:	31 October 2018

REPRESENTATION

Counsel for the Applicant:	Mr James Foley
Solicitors for the Applicant:	Phillip Silver & Associates
Counsel for the Respondents:	Mr Bora Kaplan
Solicitors for the Respondents:	DLA Piper

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 217 of 2017

CHANDRA MOHINI LATA

First Applicant

RAHUL RAJEEN CHAND

Second Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application pursuant to s.476 of the *Migration Act 1958* (Cth) (“**the Act**”) for judicial review of a decision of the Administrative Appeals Tribunal dated 20 December 2016 (“**the Tribunal**”), dismissing an application for review by the Tribunal of a decision of a delegate of the first respondent (“**the Delegate**”) made on 4 December 2015 refusing the applicants a Partner (Residence) (Class BS) visa (“**Partner Visa**”).
2. The first named applicant (“**the Applicant**”) is the primary applicant and the second named applicant is her son. The application for a

Partner Visa was made on the grounds that the Applicant and her sponsor (“**the Sponsor**”) were in a spousal relationship.

3. The issues before the Court are whether the Tribunal correctly applied Public Interest Criteria 4020 (“**PIC 4020**”) in sch.4 of the *Migration Regulations 1994* (Cth) (“**the Regulations**”) in finding that there was evidence that the first applicant had given information that is false or misleading in a material particular in relation to the application for the visa; and whether the Tribunal complied with s.359AA of the Act in giving information to the Applicant which was the reason or part of the reason for affirming the decision under review.
4. The relevant facts are accurately summarised in the submissions of the Applicant as follows:

“4. The First Applicant and [the Sponsor] are legally married.

5. On 24 June 2014, the First Applicant lodged an application for a Partner (Temporary)(Class UK)(Subclass 820) visa and a Partner (Residence)(Class BS)(Subclass 801) visa (Partner Visa).

6. The applicants were granted a Subclass 820 visa on 12 August 2015.

7. On 4 December 2015, the application for a Subclass 801 Partner Visa was refused by the delegate of the Minister. The basis upon which the delegate of the Minister refused the grant of the Partner Visa was that the First Applicant did not meet the requirements of Public Interest Criteria 4020 (PIC 4020).

8. On 20 December 2016, the decision of the delegate of the Minister was upheld by the Tribunal. In essence the Tribunal upheld the decision of the delegate of the Minister that the First Applicant did not meet the requirements of PIC 4020.”

Legislative framework

5. Pursuant to s.65(1)(a) of the Act, if satisfied of a number of matters, the first respondent may grant a visa. Section 65(1)(b) of the Act provides that, if the first respondent is not satisfied about those matters, then the Minister must refuse to grant the visa.
6. Section 31(1) of the Act provides that there are to be prescribed classes of visa. One class of visa is a Partner Visa (reg.2.01 of the *Migration*

Regulations 1994 (Cth) (“the Regulations”) and Schedule 1 to the Regulations).

7. Under s.338 of the Act, a decision to refuse to grant a Partner Visa is a decision which may be reviewed by the second respondent.
8. The requirements of the natural justice hearing rule are exhaustively stated in Division 5 of Part 5 of the Act (s.357A of the Act). Division 5 Part 5 includes ss.359A, 359AA and 360, which provide that:

“359A Information and invitation given in writing by Tribunal

(1) Subject to subsections (2) and (3), the Tribunal must:

(a) give to the Applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review.

359AA Information and invitation given orally by Tribunal while applicant appearing

(1) If an applicant is appearing before the Tribunal because of an invitation under section 360:

(a) the Tribunal may orally give to the applicant clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) if the Tribunal does so--the Tribunal must:

(i) ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision that is under review; and

(ii) orally invite the applicant to comment on or respond to the information; and

(iii) advise the applicant that he or she may seek additional time to comment on or respond to the information; and

(iv) if the applicant seeks additional time to comment on or respond to the information--adjourn the review, if the Tribunal considers that the applicant reasonably needs additional time to comment on or respond to the information.

(2) A reference in this section to affirming a decision that is under review does not include a reference to the affirmation of a decision that is taken to be affirmed under subsection 362B(1F).

360 Tribunal must invite Applicant to appear

(1) The Tribunal must invite the Applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.”

9. Section 359AA of the Act permits the Tribunal to give orally to an applicant clear particulars of any information that the Tribunal considers would be the reason or part of the reason for affirming the decision under review. The Tribunal must ensure that the applicant understands the relevance of the information and the consequences of any information being relied upon. The Tribunal must also invite the applicant to comment on or respond to the information and advise the applicant that the applicant may seek additional time to comment on or respond to the information.
10. However, a purported decision of the second respondent which is affected by jurisdictional error is not a decision which is made under the Act and therefore is not a privative clause decision (see *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476).
11. Relevantly, cl.820.226 of Schedule 2 to the Regulations requires that an applicant meet Public Interest Criterion (“**PIC**”) 4020 and PIC 4021. PIC 4020 is contained in Schedule 4 to the Regulations, and is as follows:

“4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

- (a) the application for the visa; or*
- (b) a visa that the applicant held in the period of 12 months before the application was made.*

(2) The Minister is satisfied that during the period:

- (a) starting 3 years before the application was made; and*
- (b) ending when the Minister makes a decision to grant or refuse the application;*

the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:

- (a) compelling circumstances that affect the interests of Australia; or*
- (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;*

justify the granting of the visa.

(5) In this clause:

information that is false or misleading in a material particular means information that is:

- (a) false or misleading at the time it is given; and*
- (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.”*

12. Section 97 of the Act defines “*bogus document*” as:

“...in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.”

The Tribunal's review and decision

13. The Tribunal identified the issue before it as whether the Applicant met PIC 4020 at the time of decision and, if not, should the requirements of PIC 4020 be waived.
14. The Tribunal accepted that the Applicant is a Fijian national and that the Sponsor is an Australian citizen. The Tribunal noted that on 18 August 1966 the Sponsor married a woman and the marriage ended in June 2014.
15. The Tribunal noted that at the time of application the Sponsor provided his residential address (“**Address A**”).
16. The Tribunal noted that in December 2012 the Applicant and the Sponsor met and on 19 June 2014 the parties married.
17. The Tribunal noted that on 24 June 2014 the Applicant lodged the application for the Partner Visa, and provided information in support, including from herself, that the parties were in a genuine and continuing relationship to the exclusion of all others.
18. The Tribunal referred to information before it, which it discussed throughout the hearing to the effect that the parties’ relationship is contrived and that the Applicant had paid the Sponsor for the Partner Visa application.
19. The Tribunal noted that the Applicant gave her residential address in her visa application (“**Address B**”), whereas the Sponsor’s residential address remained at Address A.
20. The Tribunal noted that the Sponsor continued to live at Address A with his ex-wife after their divorce in June 2014, but that the parties

had stated that the Applicant would be moving in with the Sponsor at Address A as soon as his ex-wife moved out of the home.

21. The Tribunal noted a statutory declaration dated 23 June 2014 from Mr R, who provided his residential address as Address B. Mr R stated, inter alia, that the Sponsor is his mechanic and friend, that he had witnessed the Applicant and the Sponsor together and that they seemed a happy and loving couple and that he wished them a happy married life.
22. The Tribunal noted that the Applicant had stated that since the second applicant's arrival in Australia, her son, on 12 April 2014, the applicants and the Sponsor had lived at Address A.
23. The Tribunal noted that the information before it was that up to 29 October 2015, the Sponsor continued to claim that he was married to and caring for his ex-wife and continued to provide Address A with a government agency.
24. The Tribunal also noted that social media information indicated that the Applicant was in a relationship with Mr R and that they were living at Address B.
25. The Tribunal noted that in November 2015, the Sponsor provided information, inter alia, that he did not agree with the adverse information held by the Tribunal; that he lived with the Applicant at Address B; and, that Mr R was like a brother. The Sponsor stated that he permitted his ex-wife to remain at Address A because she has some disabilities. The Applicant provided information, inter alia, denying the information held by the Tribunal (which had been given to the Applicant by the Department by letter dated 29 October 2015 in accordance with s.57 of the Act). The Applicant provided a copy of the Sponsor's will dated 16 November 2015 which stated that he lived at Address A; and a copy of the Applicant's car registration dated 12 November 2015 providing Address B.
26. The Tribunal noted that at the hearing it told the Applicant that it had information which was the subject of a certificate under s.376 of the Act but that it would give that information to the Applicant, including certain information in relation to the certificate, for comment in

accordance with s.359AA of the Act. The Tribunal summarised the information as follows:

“22. The Tribunal put to the applicant information according to the relevant provision. The information is as follows:

- That the applicant paid the sponsor to sponsor her for the partner visa application.*
- That the applicant lives at [Address B] with her partner Mr [R] and they have been together for more than three years and she has lived with her sponsor as she has claimed.*
- Mr [R] is prevented from sponsoring for the partner visa because of previous sponsorships.*
- On 6 June 2013, the applicant on an incoming passenger card provided an address of Liverpool and emergency contact details as Rajesh •••••398.*
- On 4 February 2014, [the second applicant] provided his residential address as the Rooty Hill Road address.*
- On 12 April 2014, the applicants son, [...], on an incoming passenger card provided his residential address as [Address B] and an emergency contact of [Mr R].*
- On 14 October 2014, [the Sponsor], on an incoming passenger card provide his residential address as [Address A].*
- On 8 November 2014, [the Sponsor’s ex-wife] on an incoming passenger card provided her residential address as [Address A] and emergency contact details of the sponsor at [Address A].*
- In January 2015, [the Sponsor], on an incoming passenger card provided his residential address as [Address A].*
- On 9 August 2015, [the Sponsor’s ex-wife] in an incoming passenger card provided her residential address as [Address A] and emergency contact details of the sponsor at [Address A].*
- On 23 August 2015, [the Sponsor] and [the Sponsor’s ex-wife] travelled together.*
- On 26 August 2015, [the Sponsor], on an incoming passenger card provided his residential address as the [Address A].*

- *On 29 October 2015, [the Sponsor] continued to be recorded as being married to [his ex-wife].*

- *Independent information is that the sponsor is recorded with the residential address of [Address A] and from 15 May 2008 to 29 October 2015, [the Sponsor] received a carer allowance. On 29 October 2015 the sponsor continued to register his address as [Address A] and no other address was registered as [the Sponsor's] address."*

27. The Tribunal noted that at the hearing the Applicant sought and was granted additional time to respond. On 14 December 2016, the Applicant responded, denying all allegations in the adverse information and stating that she and the Sponsor were in a genuine and ongoing relationship; that the applicants and the Sponsor live at Address B; that the parties had been slow in updating or submitting some documents on time; that the Sponsor had updated his Centrelink records successfully; and, that she wants to live with the Sponsor all of her life. The Applicant also provided the Tribunal with a copy of a share housing agreement with the head tenant listed as Mr R at Address B and listing the applicants and the Sponsor as sub-tenants. The start date was 10 June 2014. The Tribunal noted that it drew to the Applicant's attention an alteration made to the share housing agreement and noted the Applicant's response that the owner had made a mistake in describing himself as a sub-tenant. The Tribunal also noted that it put to the Applicant that the area where the landlord/agent approved consent for the subletting by the landlord/agent was unsigned on the form.
28. The Tribunal noted that the Applicant responded by stating that she and the Sponsor were in a genuine relationship and that on 10 June 2014 the Sponsor had moved in with the Applicant at Address B. The Tribunal noted that the Applicant said that the Sponsor returned to Address A because he runs a business from his garage.
29. The Tribunal asked the Applicant why Mr R did not disclose in his statutory declaration that the applicants and the Sponsor were living at Address B, being Mr R's address. The Tribunal noted the Applicant's response, which was that she did not know whether he had thought to mention it or not because at the time Mr R made the statement they were not living together. The Applicant also said that the Sponsor had

travelled with his ex-wife to resolve land issues in Fiji and to visit their daughter in Melbourne.

30. The Tribunal noted that the Sponsor provided evidence including that he was in a genuine relationship with the Applicant and that he began living at Address B on 10 June 2014 with the applicants and Mr R. He stated that he did not understand why Mr R would not have disclosed this in his statement and that he must have lied. The Sponsor said that he travelled from Address B to Address A every day and worked as a motor mechanic from Address A. He said that he had not registered any address other than Address A because of business.
31. The Tribunal then identified documents provided to it at the hearing, including supporting statutory declarations from witnesses. The Sponsor's ex-wife also provided a statement dated 4 December 2016 in which she stated that she was aware of the recent marriage of the Applicant and the Sponsor and was grateful for being allowed to remain at Address A.
32. The Tribunal then noted the mandatory requirement that the applicants must meet in PIC 4020 and proceeded to consider whether the Applicant had given or caused to be given information that was false or misleading in a material particular. The Tribunal noted that while PIC 4020 refers to information that is false in the sense of purposely untrue, it was not necessary for the Tribunal to conclude that the Applicant was aware that the information was purposefully untrue, in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision and referred to in *Trivedi v Minister for Immigration and Border Protection* [2014] FCAFC 42.
33. The Tribunal found that the Applicant had provided information to support that she was in a spousal relationship with the Sponsor, whereas other evidence before the Tribunal was to the effect that the Applicant was in a relationship with Mr R.
34. The Tribunal found that in claiming to be in a spousal relationship with the Sponsor, the Applicant had provided information to the Department in support of her visa application that was false or misleading. The Tribunal found that at the time the Applicant was married to the

Sponsor she was living at Address A with Mr R. That statement by the Tribunal is in fact incorrect, as the Applicant had never claimed to have lived at Address A. I accept that the reference to Address A in that finding is intended to be Address B.

35. The Tribunal found that Mr R had failed to disclose that he lived at the same address as the Applicant. The Tribunal placed no weight on the share housing agreement because the Tribunal found that document to have been altered and to be retrospective. The Tribunal did not accept the Applicant's explanation as to the Tribunal's expressed concerns about the share housing agreement.
36. The Tribunal noted that the parties had said they had been slow in updating or submitting correct information. The Tribunal did not accept that it would take the Sponsor two and a half years to change his details or for the parties to provide independent documents about where they lived. In reaching that finding, the Tribunal had regard to the statement of Mr R in which he failed to disclose that the applicants and the Sponsor were living with him three weeks after they asserted that they had moved in with him. The Tribunal noted that Mr R had described the Sponsor as his friend and that he had personally witnessed the parties together as a happy and loving couple.
37. The Tribunal then made the following finding:

"The Tribunal is not satisfied that, at the time of application the applicant was in a genuine spousal relationship with the sponsor as she claimed in information provided with the applicant and as a result she provided false and misleading information at the time it was given. The Tribunal is of the view that the applicant provided false and misleading information in the visa application about her spousal relationship with the sponsor to deceive the Department about the true nature of her relationship, in order to meet the criteria for the grant of the visa. The Tribunal does not accept that the applicant lived separate from the sponsor while waiting for his ex-wife to move out of [Address A] because the sponsor's ex-wife continues to live at [Address A]. It also does not accept that [Mr R] would not have stated that the parties were living with him, if in fact, that was the case as the parties claimed."

38. The Tribunal considered the Sponsor's ex-wife's statement but was unable to test her statement as she did not attend the Tribunal hearing.
39. The Tribunal then stated that:
- “Other information is that the applicant was living with [Mr R] in a de facto relationship at [Address B]. In [Mr R's] statement made after the parties claim to be living together at [Address B], he fails to mention that the parties are living with him at [Address B] and the Tribunal considers it not reasonable that he would fail to do so.”*
40. The Tribunal then found that information that the Sponsor continued to live with his ex-wife and that the Applicant lived with her partner, Mr R, was relevant to the criteria in cl.801.226 of Sch. 2 of the Regulations because at the time the Applicant claimed to be in a spousal relationship with the Sponsor, she continued to be in a relationship with Mr R.
41. In the circumstances, the Tribunal was not satisfied that the applicants had met the criterion in PIC 4020.
42. The Tribunal considered whether PIC 4020(1) or (2) should be waived. The Tribunal noted that it had not been provided with any evidence of compelling circumstances that affect the interests of Australia and ultimately concluded that there were not compelling or compassionate circumstances to waive PIC 4020.
43. Accordingly, the Tribunal affirmed the decision under review to refuse the Applicant a Partner Visa.

The proceeding before this Court

44. The Applicant was represented before this Court by Mr Foley, of counsel.
45. The Applicant sought leave to rely on an Amended Application at the hearing.
46. Ultimately, leave was granted to the applicants to rely on Grounds 1, 2 and 4(a), (b) and (c) of the Amended Application. The applicants withdrew reliance on Grounds 3 and 5.

47. The Grounds relied upon are as follows:

“Ground 1

1 The Tribunal has constructively failed to exercise the jurisdiction.

Particulars

(a) The First Applicant claimed to be in a genuine relationship with [the Sponsor], in applying for a Partner (Residence) (Class BS) visa.

(b) The Tribunal made a finding that 'an element of fraud or deception by some person is necessary to attract the operation of [PIC 4020]' ((31) of the reasons of the Tribunal).

(c) The Tribunal found that:

(i) It was 'not satisfied at the time of the application the applicant was in a genuine spousal relationship with the sponsor as she claimed in information provided with the application .

(ii) Based upon the finding above, found that the First Applicant 'provided false and misleading information in the visa application about her spousal relationship with the sponsor to deceive the Department about the true nature of their relationship ' (see [36] of the reasons of the Tribunal).

(d) In order to determine that the First Applicant had acted fraudulently or deceptively as set out above, it was necessary for the Tribunal to find that the First Applicant was not in a genuine relationship with the Sponsor.

(e) The Tribunal did not make any finding as to whether the First Applicant and the Sponsor were in a genuine relationship and did not consider the 'Schedule 2 criteria' in making any such finding.

(f) Accordingly:

(i) There was no reasonable or rational basis to find that the First Applicant acted fraudulently or deceptively.

(ii) The Tribunal thereby failed to constructively exercise its jurisdiction.

Ground 2

2 The decision of the tribunal decision is irrational or unreasonable and is accordingly infected with jurisdictional error.

(a) 'Fraudulent or deceptive conduct' finding:

(i) The Tribunal made a finding that there was present 'an element of fraud or deception by some person' ([31] of the reasons of the Tribunal).

(ii) The Tribunal's decision does not disclose which person or persons acted fraudulently or deceptively (save for the finding referred to in Ground 1 above).

(iii) The findings of the Tribunal did not provide any rational or reasonable basis to conclude that any person had engaged in fraudulent or deceptive conduct.

(b) Unreasonable factual findings:

(i) The Tribunal misconstrued the will of the Sponsor (CB165-167), in finding that the Sponsor's will stated that the Sponsor lived at [Address A] ([19] of the reasons of the Tribunal). The will does not state that the Sponsor lives [Address A].

(ii) The finding by the Tribunal that the Tribunal had not been provided with any corroborative information about a business being run from [Address A] ([3 7] of the reasons of the Tribunal), is unreasonable and failed to take into account relevant facts and information. Specifically, The Tribunal failed to consider the certificate of Registration of Business Name (CB77).

(c) Taking into account irrelevant matters, or taking matters into account unreasonably:

(i) The Tribunal asked the First Applicant why [Mr R] in a statutory declaration dated 23 June 2014 (CB62-63) did not disclose that the all parties were living at [Address B] (which is in any event stated as [Mr R's] address in the statutory declaration) ([27] of the reasons of the Tribunal). The statutory declaration did not require such information to be disclosed, and any explanation that could be offered by the First Applicant could have no rational effect on the decision of the Tribunal. By taking this into account, the Tribunal acted unreasonably and irrationally.

(ii) The Tribunal exhaustively questioned the First Applicant on the conduct of the Sponsor in relation to the addresses provided by the sponsor on incoming passenger cards [22] of which the First Applicant could not reasonably have knowledge.

[...]

Ground 4

4 The Tribunal failed to afford the applicants procedural fairness.

Particulars

(a) The Tribunal made findings based upon social media information relating to the First Applicant, specifically that the First Applicant was in a relationship with [Mr R] ([17] of the reasons of the Tribunal). This social media information was not provided to the First Applicant, or put to the First Applicant, in a manner which afforded the First Applicant an opportunity to address or respond to any such prospective finding.

(b) The Tribunal failed to put the adverse information to the First Applicant (through an interpreter) in a reasonable and logical manner which allowed the First Applicant to understand each allegation separately and comment upon each allegation separately (see [22] of the reasons of the Tribunal).

(c) At numerous points throughout the proceedings, the First Applicant was unable to properly understand the matters put to the First Applicant, and the evidence of the First Applicant was not effectively communicated to the Tribunal Member.”

Ground 1

48. At the heart of the Applicant’s submission in support of Ground 1 was a contention that the Tribunal had stated only that it was “*not satisfied at the time of the application*” that the Applicant was in a genuine spousal relationship with the Sponsor; whereas it was necessary for the Tribunal to find that the Applicant was not in a genuine relationship with the Sponsor in order to determine that the Applicant had acted fraudulently or deceptively.

49. The particular finding which the applicants rely on is as follows:

“The Tribunal is not satisfied that, at the time of application, the applicant was in a genuine spousal relationship with the sponsor as she claimed in information provided with the application and as a result she provided false and misleading information at the time it was given.”

50. That quotation however ignores the following sentence in which the Tribunal states that it:

“...is of the view that the applicant provided false and misleading information in the visa application about her spousal relationship with the sponsor to deceive the Department about the true nature of her relationship in order to meet the criteria for the grant of the visa.”

51. Fairly read, that is a finding by the Tribunal that the Applicant and the Sponsor were not in a spousal relationship and in asserting that they were, the Applicant provided false and misleading information.
52. Fairly read, the Tribunal’s reasons make clear that it accepted information before it that the Sponsor had continued to live with his ex-wife and the Applicant lived with her partner, Mr R, with whom she continued to be in a relationship. The overwhelming inference from the findings made by the Tribunal, in a less than elegant way, was that it was making a positive finding that the Applicant and the Sponsor were not in a genuine spousal relationship.
53. I do not accept the submission of the Applicant that the Tribunal’s statement that it was not satisfied that at the time of application that the Applicant was in a genuine spousal relationship with the Sponsor was anything more than the Tribunal having regard to the definition of “spouse” as defined in s.5F of the Act and not being satisfied that the parties met that definition. Clause 801.226 of sch.2 of the Regulations required that the applicant satisfy PIC 4020 as a mandatory criterion of her visa. The Tribunal found that the Applicant did not meet PIC 4020 and therefore the Tribunal was not satisfied that the parties were in a genuine spousal relationship. In other words, having found that the Applicant did not meet PIC 4020 because the Applicant had given false or misleading information in a material particular that she and the Sponsor were in a genuine spousal relationship, the Tribunal was not satisfied that the parties were in a genuine spousal relationship in accordance with the definition of “spouse” and therefore did not meet

the criteria for the Partner Visa. Not having been so satisfied, s.65(1)(b) of the Act mandated that the Tribunal must refuse the Applicant's visa application.

54. Accordingly, Ground 1 is not made out.

Ground 2

55. Ground 2 asserts that the decision of the Tribunal was irrational or unreasonable in certain respects.

56. In particular, the Applicant asserted that the Tribunal misconstrued the will of the Sponsor in finding that the Sponsor's will stated that the Sponsor lived at Address A because the will does not use those words and simply states the Sponsor's name and then gives Address A. The will was made on 16 November 2015. It was made by a solicitor. Counsel for the Applicant had suggested that it is not uncommon for a testator to identify his solicitor's address as his address. However, in the Sponsor's will he stated his name and gave Address A.

57. In the circumstances, in relation to the will, having regard to the other evidence before it, it was open to the Tribunal to find that the will reflected the fact that the Sponsor lived at Address A.

58. The second particular is that the Tribunal found that it had not been provided with any corroborative information about a business being run from Address A, whereas the Tribunal failed to consider the Certificate of Registration of Business Name which gave that address. The Certificate of Registration that was provided showed that it was valid from 21 February 2012 until 21 February 2015. The Tribunal was correct to say that there was no other evidence before it of any other address in respect of the Sponsor other than Address A and that the Sponsor had not provided any corroborative evidence beyond the Certificate of Registration in relation to his business being run from Address A.

59. In relation to the Sponsor's business being run from Address A, the Tribunal found that at the time the parties claimed to be in a spousal relationship, the Sponsor continued to register Address A with Centrelink and that there was no information before the Tribunal that he had registered any other address until 14 December 2016.

60. In the circumstances, the Tribunal's findings in respect of those pieces of evidence were open to it on the evidence and material before it and for the reasons it gave.
61. Further, in Ground 2, the applicants contended that it was either irrational or unreasonable for the Tribunal to place the weight that it did on the failure by Mr R in his statutory declaration to mention that the applicants and the Sponsor were all living with him at Address B. Again, the Tribunal had before it information that the Applicant was in a relationship with Mr R and was paying the Sponsor to sponsor her visa application. In those circumstances, it was open to the Tribunal to have regard to the evidence of Mr R, to assess it as it did and to make the findings that it did in respect of that evidence.
62. The applicants also assert in Ground 2 that the Tribunal exhaustively questioned the Applicant on the conduct of the Sponsor in relation to addresses provided by the Sponsor on incoming passenger cards and that the Applicant could not reasonably have had knowledge of those matters. I understand that submission to relate to information before the Tribunal that it identified, namely that on 14 October 2014, the Sponsor provided his residential address as Address A on an incoming passenger card. In January 2015 the Sponsor again provided his residential address as Address A on an incoming passenger card. Again, on 26 August 2015 that the Sponsor provided his residential address as Address A.
63. It was open to the Tribunal to question the Applicant about that conduct of the Sponsor in circumstances where during most of those periods the Applicant was asserting that she lived with the Sponsor at Address B.
64. It was also open to the Tribunal to find that evidence before it to be unsupportive of the Applicant's assertion that she was in a genuine spousal relationship with the Sponsor at those times.
65. As stated above, those findings were open to the Tribunal on the evidence and material before it and for the reasons it gave.
66. Accordingly, Ground 2 is not made out.

Ground 4

67. Ground 4(a) asserts that the Tribunal made findings in respect of social media information which was not provided to the Applicant for comment.

68. In support, the Applicant's counsel referred to the statement by the Tribunal as follows:

"Social media information is that [the Applicant] was in a relationship with her partner [Mr R] and that they were living in [Address B]."

69. It was common ground that the only "*social media*" information before the Tribunal was five photographs depicting people that may bear some relationship to the applicants or the Sponsor. Those photographs do not, by themselves, undermine or reject the applicants' claims and were not identified as part of the reason for the Tribunal affirming the decision under review. Accordingly, that social media information did not enliven any obligation under s.359A of the Act to give that information to the Applicant for comment (see *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 at [17] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

70. A fair reading of the Tribunal's decision record makes clear that the information upon which it relied in finding that the Applicant was in a relationship with Mr R, who was her partner, and that they were living at Address B, was from other information provided to the Department which was the subject of a s.376 certificate, but which the Tribunal gave to the Applicant for comment in purported compliance with s.359AA of the Act.

71. Ground 4(b) and (c) contend that the Tribunal did not give that information in a manner that the Applicant could reasonably understand.

72. Below is the exchange between the Tribunal member and the Applicant in respect of that information:

"74. [Tribunal Member]: Um, now the first thing I'm going to do is put some information to you. Um, the Tribunal, the, the Department's file is the subject of a Section 376 Certificate."

75. *Interpreter: Section?*

76. [Tribunal Member]: 376.

77. *Interpreter: 376. [foreign language 00:15:04].*

78. [Applicant]: *Okay.*

79. [Tribunal Member]: *And I will be putting the information to you in relation to that certificate, along with other information. I am now putting that information to you that I would consider to be the reason for affirming the decision. The information is as follows: that you have paid to sponsor you for the Partner Visa application, that you live at [Address B] with your partner, [Mr R] 00:15:53].*

80. *Interpreter: [foreign language 00:15:58]. What's the address, sorry?*

81. [Tribunal Member]: *Uh, that the applicant lives at [Address B] with her partner, [Mr R], and that you have been together with [Mr R] for than three years and not with your sponsor as claimed. [Mr R] is prevented from sponsoring you for the Partner Visa because of previous sponsorships. On the 6th of June 2013 on an incoming passenger card, you provided an address of Liverpool, and emergency contact details as Rajesh. On the 4th of February 2014...*"

73. In my view, the Tribunal has fairly put the information to the Applicant. Namely, information that the Applicant paid the Sponsor for her Partner Visa; that the applicant lives with her partner, Mr R, at Address B, and has done so for more than three years; that on 6 June 2013 the Applicant provided Mr R's details as her emergency contact; and, that Mr R had been prevented from sponsoring the Applicant for the Partner Visa because of previous sponsorships. The Tribunal went on thereafter to explore the Applicant's and the Sponsor's uses of Address A and Address B as disclosed on various incoming passenger cars in respect of the Sponsor, his ex-wife and the Applicant.
74. The Tribunal also puts to the Applicant that the Sponsor received a carer's allowance and on 29 October 2015 continued to register his address as Address A and that no other address was registered for the Sponsor. The Tribunal stated to the Applicant that the relevance of the information was that it informed the Tribunal that the Applicant and the

Sponsor were living apart, that the Applicant was living with Mr R at Address B, and that the Sponsor was living with his ex-wife at Address A.

75. The Tribunal then stated:

“...the consequences of this information is that it would leave the Tribunal to determine that there is evidence before it, that you have given or caused to have given to the Minister, an...officer...a relevant assessing authority, or a medical officer of the Commonwealth a bogus document or information that is false or misleading in the material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made. This will leave the Tribunal to find that you do not meet Public Interest Criteria 4020.”

76. The Tribunal then invited the Applicant to comment or to respond to the information and informed her that she may comment or respond orally or in writing and that she may seek additional time to respond.

77. The Applicant then indicated that she would like some more time to respond.

78. At the end of the hearing, the Tribunal Member stated as follows:

“511. [Tribunal Member]: I put some information to you earlier in the hearing. I went through it step-by-step, and at the end of it, I have asked you if you wanted to comment on or respond to the information. Um, I told you that you could comment on or respond to the information orally or in writing, and that you could, uh, seek additional time to comment on, or respond to the information. At that time in the hearing, you indicated that you would like additional time to comment on or respond to the information. [crosstalk 01:34:09]. Sorry, go on. So I am allowing you seven days from today's hearing date to comment on or respond to the information. On receipt of that information, I will consider all of the evidence before the Tribunal, that in the files I've spoken about earlier today-

512. Interpreter: Sorry?

513. [Tribunal Member]: ... that the information in the files I spoke about earlier, the information that has been provided at the hearing, and the response to the information that I have put to you, and I will make a decision in your case. The decision will be

in written format, and it will be sent to the nominated, uh, address...”

79. In the circumstances, the manner in which the Tribunal gave the Applicant the information for comment complied with the requirements of s.359AA of the Act. The Applicant was given further time following the hearing to make any further comments or submissions and was informed that the Tribunal would consider those.
80. In the circumstances, Ground 4 is not made out.

Conclusion

81. A fair reading of the Tribunal’s decision record makes clear that the Tribunal understood the claims being made by the Applicant; explored those claims with the Applicant at a hearing; and, had regard to all material provided in support. The Tribunal put to the Applicant matters of concern it had about her evidence and noted the Applicant’s responses.
82. The Tribunal then made findings based on the evidence and material before it. Those findings of fact were open to the Tribunal on the evidence and material before it and for the reasons it gave. A fair reading of the Tribunal’s decision record makes clear that the Tribunal reached conclusions based on the findings made by it and to which it applied the correct law.
83. In the circumstances, the Tribunal complied with its obligations under the statutory regime in the making of its decision, including the conduct of its review.
84. The Tribunal’s decision is not affected by jurisdictional error and is therefore a privative clause decision. Accordingly, pursuant to s.474 of the Act, this Court has no power to interfere.
85. The proceeding before this Court should be dismissed with costs.

I certify that the preceding eighty-five (85) paragraphs are a true copy of the reasons for judgment of Judge Emmett

Associate:

Date: 31 October 2018